

St. Vincent Health System and Office & Professional Employees International Union, AFL-CIO, Petitioner. Case 26-RC-8124

March 24, 2000

DECISION AND DIRECTION OF SECOND ELECTION

The National Labor Relations Board, by a three-member panel, has considered objections to an election held November 4, 5, and 6, 1999, and the hearing officer's report recommending disposition of them.¹ The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 374 for, and 382 against, the Petitioner, with 26 challenged ballots, a sufficient number to affect the results.²

The Board has reviewed the record in light of the exceptions and briefs, has adopted the hearing officer's findings³ and recommendations,⁴ and finds that the election must be set aside and a new election held.

[Direction of Second Election omitted from publication.]

¹ The pertinent portions of the hearing officer's report are attached as an appendix.

² During the hearing, the parties agreed that nine ballots, challenged by the Petitioner, would be opened and counted, and that the remaining challenges would be sustained. The revised tally of ballots shows 376 for, and 389 against, the Petitioner, with no remaining undetermined challenged ballots.

³ We correct the hearing officer's report to show that the Petitioner withdrew Objection 9 at the hearing and that the hearing officer overruled Objection 14.

In the absence of exceptions, we adopt, pro forma, the hearing officer's overruling of Objections 14 and 22 and that part of Objection 13 which alleges that the Employer maintained a list of employees who did or did not vote in the election.

⁴ In adopting the hearing officer's recommendation that the election be set aside, we rely only on the conduct pertaining to the following objections: Objections 2 (the threat by Director of Nursing Harty), 3, 6, 8, 11 (the threats by Director of the Coronary Care Unit Trevino), and 15. We find it unnecessary to pass on the hearing officer's findings regarding other alleged objectionable conduct. With respect to the findings regarding Objection 6, which we adopt, we find it unnecessary to rely on the dissent in *Crowley, Milner & Co.*, 216 NLRB 443 (1975), which the hearing officer cites. Member Brame finds it unnecessary to rely on Objection 6.

We decline to follow the hearing officer's suggestion that the second election be conducted by mail ballot. The parties' Stipulated Election Agreement provided for a manual election and that "agreement cannot be cast aside, absent unusual circumstances which make the agreement impossible to perform." *T & L Leasing*, 318 NLRB 324, 326 (1995). Therefore, we find it unnecessary to pass on the question whether, in the absence of the Stipulation, a mail-ballot election would be appropriate under *San Diego Gas & Electric*, 325 NLRB 1143 (1998). Member Brame would find a mail-ballot election here inappropriate in any case. See his dissenting opinion in *San Diego Gas & Electric*, supra.

APPENDIX

**HEARING OFFICER'S REPORT AND
RECOMMENDATIONS ON CHALLENGES AND
OBJECTIONS TO ELECTION**

The Threat by Director of Nursing Harty

At 1 p.m. that day, Director of Nursing Harty returned to the table in the cafeteria where Coleman and Naiad were sitting and asked how things were going. Harty then remarked to Coleman, "I want you to remember, you are an employee of St. Vincent and we sign your paycheck. If I wanted you gone, you'd be gone. I am a very straightforward person." Harty's version of this incident differs only slightly. Harty claims that she told Coleman that St. Vincent signed both of their paychecks and that the hospital had rules that must be followed. Harty claims, "I might have said if we wanted this to be gone, meaning the table from the cafeteria, breaking down the, you know, their pamphlets and literature, that would be gone." I credit Coleman and Naiad with regard to this conversation, and find Harty's testimony to be contrived.

Harty's comment was, of course, a threat, and is independently violative of Section 8(a)(1) of the Act, and therefore an act of election interference.

The Actions of the "Vote No" Committee

Concerning the purple "Vote No" ribbons, RN Patricia Louise Lashley credibly testified that she observed stipulated Supervisor Dana Downs-Hall handing out purple ribbons to the employees in the outpatient department, and pinning a purple ribbon on RN Tesisita Rose. Rose later told union organizers that she was afraid to remove the purple ribbon, for fear that the Employer would know that she favored the Union.

One other individual was involved in the distribution of the purple "Vote No" ribbons. According to RN Sheila D. Taylor, on October 27, 1999, Sister Margaret was handing out purple ribbons to the RNs in the emergency room, telling them, "These ribbons are symbols of solidarity against the Union." It is unclear precisely what Sister Margaret's position is with the hospital, but there is testimony that Sister Margaret counsels families in the ER, and conducts the United Way campaign at the hospital.

Discussion

Further, by requesting employees to wear the "Vote No" purple ribbons, the Employer was placing employees in the position of declaring their union preference. The supervisor who engaged in this activity, Dana Downs-Hall, in effect forced each employee whom she approached to announce his or her choice for or against the Union. Such conduct is violative of Section 8(a)(1) of the Act, and constitutes impermissible election interference. *Reeves Rubber, Inc.*, 252 NLRB 134 (1980); *Crowley, Milner & Co.*, 216 NLRB 443, 448 (1975).

I make no findings with regard to the conduct of Sister Margaret, since there is insufficient evidence that she is a supervisor or is otherwise an agent of the Employer. Her duties in the emergency room seem consistent with her religious vocation of comforting the sick, and providing for the less fortunate.

Concerning promises of benefits, RN Barbara J. Elrod testified concerning a meeting she attended on October 27, 1999, in the Three Northwest conference room, where Hospital Interim President and CEO Bill McDonald spoke to the RNs and CNAs present. McDonald spoke about his goals for the hospital, and asked employees, "Have you heard any good rumors?"

The employees present aired various grievances, including a lack of supplies. McDonald responded, "We are working on that."

Employees asked about salaries, and about changes in the 401(k) plan. McDonald responded, "We are going to do a market analysis to bring St. Vincent in line with other institutions. Some of you will probably be getting raises to bring you in line with the area market." Other employees complained about being "topped" out⁴ in wages, and McDonald gave the impression that he would attempt to remedy this.

While McDonald testified at the hearing, he did not address the above-referenced allegations, much less deny them. Thus, while the Union was never mentioned during McDonald's meeting with employees, the timing of this meeting less than a week before the election, coupled with the solicitation of employees grievances and the explicit and implied promises to remedy those grievances, leads to the conclusion that this conduct was another act of impermissible election interference.

Threats by Lori Trevino

Other employees, however, were the recipients of remarks that they viewed as threats of reprisal. RN Jeffrey Wayne Allison testified concerning a conversation he had with Lori Trevino,⁴ the director of the CCU, and his immediate supervisor. Trevino is stipulated to be a statutory supervisor. According to Allison, around the first week of October, he spoke with Trevino near the main desk in the unit, and Trevino remarked, "One [sic] this union stuff blows over, we are going to get rid of these people who have negative attitudes." There can be little doubt as to which people Trevino perceived as having bad attitudes. Several weeks later, in mid-October, Trevino called a unit meeting in the conference room of the CCU, which was attended by five RNs. At this meeting, Trevino discussed the employees with bad attitudes who had started the union activity, and repeated her threat to get rid of them once the union campaign was over. Trevino mentioned RN Audley Frijlink, an ardent union supporter, by name.

Trevino repeated her threat again a few days before the NLRB election, again commenting to RN Jeffrey Allison, "People with negative attitudes who are stirring up the union trouble . . . we will get rid of them once its over."

Trevino testified at the hearing, and denied these threats attributed to her. However, RN Mark Gregory, who also works in the CCU, testified as a rebuttal witness, and he asserts that Trevino made these threatening remarks. Thus, I specifically discredit Trevino, and conclude that all of these remarks by Trevino are threats, and constitute a basis for setting aside the election conducted in this matter.

RN Philip Paul Winters works on Three North in the medical surgery unit. He testified concerning remarks made to him by Lori Trevino, the director of the CCU during the week of October 18, 1999. According to Winters, Trevino came into his unit and commented that she wanted to make sure that everyone voted on the union issue. Supervisor Stella Partin remarked to Trevino, "You might want to say that to Phil [Winters], he supports the Union."

Trevino then turned to Winters and commented, "You know you will get less pay." Winters replied that Trevino couldn't say such a thing to him, but Trevino continued, "If the union gets in, you will get less pay, you will start from nothing." Trevino denies making this remark, but as noted previously, I discredit her. Trevino's remarks constitute a threat of loss of benefits, and election interference. *Uniroyal Technology Corp.*, 324 NLRB 429, 432 (1997); *Eaton Technologies*, 322 NLRB 848 (1997).

Objection 8 alleges that the Employer confiscated union literature. Two witnesses testified with respect to this objection. RN Rosemary Rogers, who works in the ER testified that there is a large bulletin board in the ER lounge, where official notices to employees are posted, but also personal announcements such as notification of baby showers, birthday parties, birth announcements, and cars for sale. Employees do not need permission to post materials on this bulletin board, and beginning in the spring of 1999, Rogers posted announcements concerning union-related issues more than 30 times. Rogers notes, however, that closer to the election, in October 1999, notices would disappear from the bulletin board within hours of posting.

On or about October 20, 1999, Rogers had a conversation with Bob Burritt, the director of the ER, a stipulated supervisor. Burritt remarked, "Things that are on the bulletin board are not to be taken down by anyone but the person who posted them, except the union things. I have to take them down." Evidently, what prompted this outburst was that someone had removed a poster posted by Sister Margaret concerning the Star Campaign, a scholarship program, and Sister Margaret had complained to Burritt. Rogers notes that she never saw anyone remove any union literature from the bulletin board.

RN Joyce L. Roberts, who also works in the ER, tells a similar story. She has been posting union notices on the ER bulletin board since January or February 1999. However, around October 1999, the union literature was removed with alacrity. She has no idea who was removing her postings.

Burritt did not take the stand during the hearing, thus, I must credit the Petitioner's witnesses. In the absence of the admission by ER Director Burritt that he had instructions to remove union literature from the bulletin board, I would have no basis for attributing the mysterious disappearance of union literature to the Employer. After all, prounion employees may well have removed union-related postings for closer perusal elsewhere. Antiunion employees may have removed the prounion postings for their own purposes. Burritt's admission to RN Rogers, coupled with the acceleration of campaign activities as the election date approached, causes me to conclude that Burritt removed the prounion literature from the ER bulletin board, thus interfering with employees Section 7 rights, and with a free and fair election. *Eaton Technologies*, supra; *St. Anthony's Hospital*, 292 NLRB 1304 (1989). While the Employer contends that Burritt's conduct was isolated, and that there is no evidence that any union literature was removed from any of the more than

⁴ Trevino's name is incorrectly spelled "Previno" in the official transcript.

100 bulletin boards located elsewhere in the Employer's facility, I nonetheless recommend that Objection 8 be sustained.

Conclusions and Recommendations

Having recommended that Petitioner's Objections 13 and 22 be overruled, and that Petitioner's Objections 1, 2, 3, 4, 6, 8, 9, 11, 13, 14, 15, 16, 17, and 18 be sustained, it is further recommended that the election conducted on November 4, 5, and 6, 1999, be set aside, and a second election directed.⁵

Should the Board adopt this recommendation, I urge the Board to direct that the rerun election be conducted by mail ballot. As noted previously in this report, only 765 employees cast valid ballots, out of 850 eligible voters, a voter turnout of only 90 percent. This voter turnout rate is substantially lower than the typical turnout of approximately 95 percent in most Board elections, would no doubt have been even lower had not the Employer paid off-duty employees 2 hours pay to come in and vote.

During this election, every effort was made to accommodate voters. While Section 11316 of the Board's Casehandling Manual notes that a typical checking table can accommodate 250–400 voters per hour, here an astonishing *105 hours* of voting was conducted over a 3-day period, at a total of three different voting sites. This resulted in a substantial expense to the Board

for travel, lodging, and compensatory time for the Board agents involved.

In *San Diego Gas & Electric*, 325 NLRB 1143 (1998), the Board clarified the circumstances under which Regional Directors might direct the use of mail ballots. Among the factors listed by the Board is whether employees are "scattered" because of their job duties over a wide geographic area, or are "scattered" in the sense that their work schedules vary significantly. The Regional Director is also to consider the desires of the parties, the likely ability of voters to read and understand a mail ballot, the efficient use of Board resources. Here, there is testimony from the Employer's interim president and CEO that there is *never* a time when all eligible voters are scheduled to work, thus, voters are "scattered" in their work schedules, providing coverage 24 hours per day, 7 days a week, 365 days per year. As noted previously, voters are also geographically "scattered," working at three different worksites, thus requiring multiple voting locations for manual voting.

These are well-educated voters, who can easily cope with the minimal challenge of casting a mail ballot. Finally, I note that conducting the rerun election by mail ballot will not only result in a substantial cost savings to the Board, and would be a much more efficient and economic use of Board agent time, but will also eliminate many of the issues raised by the Petitioner with regard to alleged improprieties in the manual voting process. Simply put, there would be no issues with regard to list keeping, or campaigning among voters waiting in line to vote, or misconduct by election observers. I strongly urge that mail balloting be directed in the rerun election.

⁵ Under the provisions of Sec. 102.69 of the Board's Rules and Regulations, exceptions to this report may be filed with the Board by February 8, 2000. Any party may waive its right to request review by signing the attached waiver form and submitting it to the Board in Washington with a copy to the Regional Director.